United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

In The 75-7694

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 75-7694
76-3003

B

P/S

TRUCK DRIVERS LOCAL UNION N 807,
INTERNATION L BROTHERHOOD OF AMSTERS,

Plaintiff-Appellant,

v.

THE BOHACK CORPORATION,

Defendant-Appellee.

TRUCK DRIVERS LOCAL UNION NO. 807,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

v.

HONORABLE JACOB MISHLER, CHIEF JUDGE
UNITED STATES DISTRICT COURT EASTERN
DISTRICT OF NEW YORK,

Respondent.

PLAINTIFF-APPELLANT & PETITIONER'S BRIEF

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DISTRICT OF NEW YORK,

Respondent.

BRIEF OF PLAINTIFF-APPELLANT AND PETITIONER, TRUCK DRIVERS LOCAL UNION NO. 807, I.B.T.

STATEMENT OF ISSUES

1. Whether a Writ of Mandamus should Issue.

2. Whether the Norris-LaGuardia Act Requires that the temporary Restraining order of Chief Judge Mishler be vacated.

3. Whether the conduct of The Bohack Corporation, constitutes an assumption of the labor agreement between the debtor and Truck Drivers Local Union No. 807, I.B.T.

4. Whether Rule 919(b) of the Rules of Bankruptcy Procedure supercedes the grievance procedure in the labor agreement between the debtor and Truck Drivers Local Union No. 807, I.B.T.

5. Whether the May 16, 1975 grievance award of the New York City Joint Area Local Committee should be confirmed.

THE DECISION BELOW

On November 19, 1975 Chief Judge Mishler of the United States District Court, Eastern District of New York, rendered a Memorandum of Decision and Order (117a-129a) (a) vacating a preliminary injunction granted by Bankruptcy Judge C. Albert Parente; (b) dismissed Truck Drivers Local Union No. 807, I.B.T.'s ("Local 807") petition to confirm a grievance award of the New York City Joint Area Local Committee ("Committee") and directed the Clerk to enter judgment in favor of The Bohack Corporation ("Bohack") and against Local 807; (c) remanded to Bankruptcy Judge Parente "The issue of the advisability of granting the debtor leave to arbitrate (129a) and (d) signed Bohack's temporary restraining order. Judge Mishler's order also provided for him to hear Bohack's motion for a preliminary injunction (129a) on November 26, 1975.

On November 25, 1975 the Hon. Mark A. Costintino signed Local 807's order to show cause why the November 19, 1975 temporary restraining order should not be dissolved (154a-155a). Local 807's

motion was also returnable before Judge Mishler on November 26. On said return date Judge Mishler heard argument on the motion to dissolve and summarily denied it. He, also, orally extended the November 19 temporary restraining order pending Judge Parente's determination of the remanded issue and Bohack's proceeding to disaffirm its labor agreement with Local 807. Judge Mishler's extention of the temporary restraining order included the period of any appeal from Judge Parente's initial determination of these is sues (187a-188a).

On December 12, 1975 Local 807 served and filed its Notice of Appeal from the judgment of the United States District Court for the Eastern District of New York, entered on November 19, 1975, in favor of Bohack and against Local 807, dismissing Local 807's petition to confirm the grievance award. On December 30, 1975 Local 807 served and filed a Petition for a writ of mandamus or other appropriate writ:

(a) dissolving the temporary restraining order against Local 807, dated November 19, 1975,

(b) staying Chief Judge Mishler's remand to the Bankruptcy Court of the issue whether Bohack should be compelled to arbitrate its labor disputes with Local 807,

(c) compelling immediate submission of those disputes to the grievance procedure contained in the Local 807-Bohack labor agreement, and

(d) staying the proceeding before Bankruptcy Judge C. Albert Parente, wherein Bohack seeks to reject its July 1, 1973 - March 31, 1976 labor agreement with Local 807, pending this Court's determination of the issues set forth in the writ petition.

Also, on December 30, 1975 Local 807 made a motion to consolidate the appeal with the petition for a writ of mandamus. On January 16, 1976 this Court in separate orders (a) granted the motion to consolidate the appeal and writ proceedings and (b) deferred the petition until the hearing on the consolidated appeal.

STATEMENT OF FACTS

On July 30, 1974 Bohack filed a petition under Chapter XI of the Bankruptcy Act, 11 USC 701 et seq. Prior to July 30, 1974 Bohack operated a chain of 150 retail supermarkets in Brooklyn, Queens, Nassau and Suffolk Counties, and a warehouse and distribution terminal at 48-25 Metropolitan Avenue in Brooklyn ("Bohack Square"). Since Bohack filed said petition it has operated as a debtor in possession.

Local 852 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 852") represented the warehousemen employed by Bohack at Bohack Square. Local 807 represents all Bohack truck drivers. The collective bargaining relationship between Bohack and Local 807 has existed

for more than thirty (30) years. Bohack's truck drivers did not load or unload their trucks at the warehouse. That work was performed by Bohack warehousemen represented by Local 852. Bohack's truck drivers made all the deliveries of meat, produce, groceries dairy and bakery to Bohack's stores. The tractors and trailers utilized by the Bohack truck drivers were owned by Truck Fleets of New York, Inc. ("Truck Fleets"), a wholly owned subsidiary of Bohack.

Since May, 1974 Bohack truck drivers were picking up three (3) loads of groceries per day from Bozzuto's, Inc. ("Bozzuto"), a grocery wholesaler in Cheshire, Connecticut, and returning those loads to Bohack Square. During November, 1974 Bohack discontinued warehousing all groceries. Bohack drivers, thereafter, went to Bozzuto and to Filigree Foods, Inc. ("Filigree"), a grocery wholesaler in Totowa, New Jersey, and picked up all pre-selected grocery loads for delivery to designated stores. These loads were returned to Bohack Square. The loaded trailers were dropped in the Bohack Square parking area for delivery, the following day, to the designated stores by Bohack truck drivers. The groceries never entered into the warehouse.

Effective December 16, 1974 Truck Fleets leased twenty (20) tractors and twenty (20) trailers to Shopwell, Inc. ("Shopwell"). As of that date Bohack, unilaterally, determined that it would, thereafter, receive store deliveries of produce, dairy and bakery

products, from Shopwell's warehouse, via Truck Fleets' tractors and trailers operated by Shopwell employees. Meat and groceries continued to be delivered to the stores via Truck Fleets' equipment operated by Bohack truck drivers. The impact of this decision resulted in the virtual termination of Bohack's use of its Bohack Square warehouse (except for the meat) and the reduction in the Local 807 bargaining unit from 120 truck drivers to 60. On December 16, 1974 Local 807 filed a grievance against Bohack (1a) with the Committee pursuant to Article 45, Section 1 of the July 1, 1973 - March 31, 1976 collective bargaining agreement ("Agreement") between Local 807 and Bohack (2a-45a).[1/] Article 45, Section 1 of the Agreement (31a) states that the Committee has jurisdiction over disputes and grievances involving Local 807 and Bohack in accordance with the grievance procedure established in Article 46 (32a-34a)[2/] Local 807 has continuously maintained that Bohack's relationship with Shopwell violated Article 32, Section 1 of the Agreement (21a-22a).[3/]

1/ Local 807 and Bohack are parties to the 1973-1976 National Master Freight Agreement and New Jersey-New York Area General Trucking Supplemental Agreement and the Local 807 Rider thereto.

2/ Article 46, Section 1 provides that grievances, involving "any controversy which might arise," that are not adjusted between the parties to the Agreement are to be submitted to the Committee for settlement (32a).

3/ Article 32, Section 1 provides:

> "For the purpose of preserving work and job opportunities for the employees covered by this Agreement, the Employer agrees that no work or services of the kind, nature or type covered by, presently performed, or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other plant, person or nonunit employees, unless otherwise provided in this Agreement..."

On December 20, 1974 the Committee heard argument from representatives of both Local 807 and Bohack. On the evidence and testimony presented the Committee determined that this was a jurisdictional dispute and should be handled in accordance with the provisions of Article 30 of the Agreement (21a)[4/]

Local 807 requested a rehearing of the dispute by the Committee and on May 12, 1975 Local 807 and Bohack appeared and argued the merits of their respective cases. The Committee's award (46a), dated May 16, 1975, instructed Bohack to "cease and desist, forthwith, from having its bargaining unit work subcontracted out" in violation of Article 32 of the Agreement (21a).

4/ Article 30 provides:

> "In the event that any dispute should arise between any Local Unions, parties to this Agreement, Supplements or Riders thereto or between any local Union, party to this Agreement, Supplements or Riders thereto and any other Union, relating to jurisdiction over employees or operations covered by such Agreements, the Employer and the Local Unions agree to accept and comply with the decision or settlement of the Unions or Union bodies which have the authority to determine such dispute, and such dispute shall not be submitted to arbitration under this Agreement, Supplements or Riders thereto or to legal or administrative agency proceedings. Pending such determination, the Employer shall not be precluded from seeking appropriate legal or administrative relief against work stoppages or picketing in furtherance of such dispute."

Article 30 refers to disputes between two or more labor organizations having collective bargaining relationships with a single employer. The labor organizations must be engaged in a dispute over said employer's employees or operations which each contends is covered by its labor contract. Here, the only labor agreement that Bohack has, covering truck drivers, is with Local 807. Local 807 contends that Bohack can obtain its groceries and/or produce from any wholesaler that it desires. However, the delivery of those groceries and/or produce to its retail stores is covered by the terms and conditions of the Agreement.

At approximately the time that the Committee rendered its May 16, 1975 award Bohack discontinued receiving groceries from Filigree (which also filed a Chapter XI petition) and commenced receiving them from Krasdale Foods, Inc. ("Krasdale"). The groceries from Krasdale were pre-selected for the Bohack stores and loaded onto trucks for delivery by non-Bohack truck drivers. A small portion of the grocery volume, formerly supplied by Filigree, was shifted to Bozzuto. The Bozzuto pick-ups and deliveries continued to be made by Bohack truck drivers. Bohack's discontinuance of the pick-ups and deliveries from Filigree and its agreement with Krasdale caused a further reduction in employment for the Bohack truck drivers.

In early June, Bohack altered its relationship with Bozzuto. Instead of Bohack drivers going to Cheshire, Conn., to pick-up a load of groceries, Bozzuto drivers were delivering pre-selected grocery loads to Bohack Square. The Bohack drivers would then, only, deliver the loads to the Bohack stores. This unilateral change in operations by Bohack caused a further reduction in the drivers seniority list.

On or about May 27, 1975 Local 807 moved to confirm the Committee's May 16, 1975 award in a proceeding instituted in the Supreme Court of the State of New York, County of Queens. On or about June 5, 1975 Bohack removed that proceeding from the State Court to the United States District Court for the Eastern District of New York.

On June 17, 1975 Local 807 filed a grievance with the Committee (47a-48a) alleging the damages sustained by Bohack's truck drivers, during the period on and after May 21, 1975, as a result of Bohack's failure to comply with the May 16, 1975 award. A hearing on that grievance was never heard because Bohack requested and received a series of postponements. The initial postponement was in order to prepare its defense. Thereafter, its requests were based upon Judge Parente's contention that the May 16 award was null and void because of failure to comply with Rule 919(b) of the Rules of Bankruptcy Procedure.

By June 30, 1975 Local 807 had been advised that Bohack did not intend to comply with the Committee's award. In addition, Bohack intended to transfer the meat to Shopwell's warehouse and thereafter, make those deliveries on Truck Fleets' equipment operated by Shopwell drivers. The number of drivers regularly employed by Bohack at that time had been reduced to thirty-two (32). Article 46, Section 1(i) of the Agreement (34a) permitted economic recourse against Bohack for failure to comply with a Committee award.[5/] On June 30 Local 807 commenced peaceful picketing of Bohack Square and

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5/ Article 46, Section 1(i) of the Agreement provides:

> "Failure of any Joint Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any stage, or failure to comply with any final decision, withdraws the benefits of Article 8 and 46."

at certain of Bohack's retail stores.

On June 30, 1975 Bohack sought and obtained a temporary restraining order, from Bankruptcy Judge C. Albert Parente, enjoining Local 807 from conducting a strike, walkout or work stoppage, or establishing a picket line at Bohack's various places of business or at the premises of any other party or person doing business with Bohack during the pendency of this action (emphasis added). On July 16, 1975 Judge Parente granted a preliminary injunction. He found that neither Local 807 or Bohack requested permission from the Bankruptcy Court to proceed to arbitration pursuant to Rule 919(b) of the Rules of Bankruptcy Procedure (50a). By virtue of that failure, Judge Parente concluded that the Committee's May 16, 1975 grievance award was null and void (51a-52a). Local 807's motion for a stay of enforcement of the preliminary injunction was denied by Judge Parente on July 16, 1975. Local 807 filed a Notice of Appeal on July 18, 1975 (54a-58a).[6/]

6/ Assuming, arguendo, that the labor dispute before Judge Parente came within the narrow Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970) exception to the Norris-LaGuardia Act, 29 U.S.C. 101 et seq., and that a Bankruptcy Court has jurisdiction to grant a Boys Markets injunction, Bohack was not ordered to arbitrate nor did Bohack satisfy the conditions necessary before injunctive relief can be obtained. Emery Air Freight v. Local 295, 449 F. 2d 558 (2d Cir. 1971).

On Friday, July 18, 1975 Bohack moved, by order to show cause, (59a-62a), to have Judge Parente reject the Agreement. Also, on that day, Bohack notified its remaining 32 drivers that they were terminated. On Monday, July 21, 1975 Bozzuto drivers began delivering groceries directly from Cheshire, Conn. to Bohack's retail stores and Shopwell drivers started delivering meat to Bohack's stores directly from Shopwell's warehouse. Both of these changes violated Article 32 of the Agreement (21a-22a) and the May 16, 1975 grievance award (46a). Thus, between December 16, 1974 and July 18, 1975 Bohack systematically evaded its obligations to its 120 truck driver employees, as set forth in the Agreement, and was receiving all deliveries of produce, groceries, meat, dairy and bakery on trucks operated by non-Bohack employees. 7/

During September, 1975 Bohack discontinued using Shopwell's warehouse and truck drivers for the storage and delivery of its produce and meat. Since mid-September these items have been warehoused at Hills Supermarkets, Inc. ("Hills") building in Brentwood, Long Island. The deliveries to Bohack's stores have been made by

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7/ Truck Fleets' equipment was being used by Bozzuto and Shopwell drivers. All of the Truck Fleet equipment bore the markings of Bohack and identified the drivers to Bohack. The terms and conditions of employment for the Shopwell and Bozzuto drivers are substandard to those in the Agreement. This is also a violation of paragraph 2(a),(b) and (c) of the Bohack-Local 807 Rider to the Agreement (63a). Bohack was provided with notice of this violation on both April 28 and May 5, 1975 (65a-66a).

Hills truck drivers on Truck Fleets' equipment.[8/] Hills solicited this business and advised Bohack that it was capable of and ready to warehouse and deliver all of the food and related items sold at Bohack's stores. To date, Bohack has limited its use of Hills to produce and meat.

At both Shopwell and Hills, Bohack has occupied rent free office space with its own traffic supervisors and produce buyer. The traffic supervisors route the Truck Fleets' equipment, determine the number of loads to be delivered each day to Bohack stores, what merchandise is to be included on each load, review the work performance of the truck drivers and have recommended the discharge of drivers that have not satisfied their performance standards. The recommendations of the traffic supervisors have been followed.

On Monday, July 21, 1975, Local 807, moved by order to show cause, before Chief Judge Jacob Mishler of the United States District Court for the Eastern District of New York, for a stay of the preliminary injunction order pending the appeal. Counsel for Local 807 and Bohack appeared before Judge Mishler that afternoon and he reserved decision on executing Local 807's order. On July

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8/ The dairy and bakery is not being warehoused or delivered by either Hills or Shopwell.

23, 1975 Judge Mishler, by letter, advised counsel for Bohack and Local 807 that he signed the order to show cause and struck the provision in that order suspending Judge Parente's preliminary injunction (although his research indicated a serious question as to Judge Parente's jurisdiction under Section 301 of the National Labor Relations Act, as amended, 29 U.S.C. § 185). He suggested to Bohack's counsel that it file a complaint with the district court "under Section 301 in order to eliminate from my consideration the jurisdictional and procedural problems involved." (67a)

Local 807, on July 23, 1975, requested, by letter, of Judge Mishler that the relief requested in its moving papers be augmented to include vacating the preliminary injunction order of Judge Parente (68a). On July 24, 1975 Local 807 commenced a Section 301 action in the district court to compel arbitration of those grievances between Local 807 and Bohack resulting from the action of Bohack on July 18, 1975 in subcontracting, transferring or assigning the work theretofore performed by its drivers (71a-75a). (Docket No. 75-C-1191). On August 1, 1975 Bohack filed its answer and counterclaim (76a-81a). In the counterclaim (paragraphs 12 & 19) Bohack conditioned its willingness to submit the disputes to the Agreement's grievance procedure upon permission being granted by the Bankruptcy Court (77a-78a, 79a). Bohack also moved on August 1, 1975 for a temporary restraining order against Local 807 (82a-104a).[9/]

9/ The proposed temporary restraining order "restrained and enjoined [Local 807] from conducting a strike, walkout, or work stoppage or establishing a picket line at [Bohack's] various places of business or at the premises of any other party or person doing business with [Bohack]"(83a). (emphasis added)

On July 28, 1975 Bohack and Local 807 entered into a stipulation adjourning and staying the application to reject the Agreement, pending before Judge Parente, until a date convenient to the parties after this Court's decision in the case of Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO v. Kevin Steel Products, Inc., 519 F. 2d 698 (2d Cir. 1975) (105a-106a).[10/]

On August 1, 1975 Chief Judge Mishler heard argument on (a) vacating Judge Parente's preliminary injunction (Docket No. 74-B-933), (b) confirming the Committee's May 16, 1975 grievance award (Docket No. 75-C-905), (c) Local 807's action to compel submission of the disputes to the Agreement's grievance procedure, and (d) Bohack's motion for a temporary restraining order (Docket No. 75-C-1191). All briefs on these matters were filed on or before July 28, 1975.

On November 12, 1975 Local 807 and Bohack appeared before Judge Mishler in chambers. Judge Mishler advised the parties that he was preparing his Memorandum of Decision and Order ("Order") and directed them to appear before Judge Parente on November 17, 1975. He mandated Judge Parente to commence the trial, on Bohack's application to revoke the Agreement, on November 17. Local 807

10/ Although this matter was decided July 24, 1975 neither Local 807 nor Bohack were aware of that fact until after July 28, 1975.

was served with Bohack's summons and complaint to disaffirm the Agreement on November 17, 1975 (107a-112a). Bohack's first witness was Joseph Binder, the Executive Vice President of Bohack. Following the completion of Mr. Binder's direct examination Judge Parente adjourned the trial, sine die, to permit Local 807 to answer the complaint and conduct discovery proceedings.

On November 21, 1975 Local 807 served its answer (113a-116a). Discovery of Bohack's books and records and an examination of its witnessess was held on December 12, 1975.

On November 19, 1975 Chief Judge Mishler filed his Order (117a-129a). He (a) vacated Judge Parente's preliminary injunction; (b) dismissed Local 807's petition to confirm the Committee's May 16, 1975 award and directed the Clerk to enter judgment in favor of Bohack and against Local 807; (c) remanded to the Bankruptcy Court "[t]he issue of the advisability of granting the debtor leave to arbitrate" and (d) signed Bohack's temporary restraining order (129a, 130a-153a).[11/] The Order also provided that Judge Mishler would hear Bohack's motion for a preliminary injunction (Docket No. 75-C-1191) on November 26, 1975 (129a).

On November 25, 1975 the Hon. Mark A. Costintino signed Local 807's order to show cause why the November 19, 1975 temporary restraining order should not be dissolved (154(a)-164a). Local 807's motion was returnable before Chief Judge Mishler on November 26, 1975.

11/ Once again, submission of the disputes to the grievance procedure was not ordered and the Norris-LaGuardia conditions required before an employer can obtain injunctive relief were not satisfied. Emery Air Freight Corp. v. Local 295, I.B.T., supra, note 6.

Judge Mishler heard argument on the motion to dissolve and summarily denied it. He did not take testimony on Bohack's motion for a preliminary injunction, but orally extended the provisions of the temporary restraining order pending Judge Parente's determination of the (a) advisability of submitting the disputes to the Agreement's grievance procedure and (b) disaffirming the Agreement. If either Bohack or Local 807 appeals from Judge Parente's order the temporary restraining order is automatically extended until such time as the appeal is determined.[12/]

On November 28, 1975 Local 807 filed charges with the 29th Region Office of the National Labor Relations Board alleging violations of Section 8(a)(1),(3) and (5) of the Labor Management Relations Act, 1947 and, 29 U.S.C. 158(a)(1),(3) and (5) (202a).

12/ See 187a-188a.

ARGUMENT

POINT I

WHY A WRIT SHOULD ISSUE

Writs of Mandamus, issued by federal appellate courts under the authority of the All Writs Act,[13] have traditionally been available only in unusual circumstances, sometimes said to be those where a lower court's action can be called a "usurpation of power."[14] In recent years, however, the courts have liberalized the standards governing the circumstances in which mandamus is proper. In the 1957 case of LaBuy v. Howes Leather Co.[15] the Supreme Court held that it was proper for courts of appeals to employ the writs to effectuate what it termed their "supervisory control" over the district courts.[16] Seven years later, in Schlagenhauf v. Holder,[17] the Supreme Court held that, in certain prescribed circumstances, the courts of appeals could properly decide "novel and important" questions of law brought to them on petitions for mandamus. This authorized the use of mandamus for

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13/ 28 U.S.C. 1651 (1970).

14/ DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945).

15/ 352 U.S. 249 (1957).

16/ Id. at 259-60.

17/ 379 U.S. 104 (1964).

"advisory" purposes, a use that would not have been authorized under traditional standards.

This Court has stated that the touchstones for review by mandamus are (1) usurpation of power, (2) clear abuse of discretion or (3) the presence of an issue of first impression.[18] In Goldman, Sachs & Co v. Edelstein[19] this Court stated that:

> "Mandamus, of course, is an extraordinary remedy, available only where, in the aid of appellate jurisdiction, it is necessary to compel the district court to exercise authority when it is its duty to do so and to confine it to the lawful exercise of its lawful jurisdiction."

However, once a court of appeals finds a "touchstone for review by mandamus" it can then proceed to answer ancillary questions where they are "new and important."[20]

A circuit court's appellate jurisdiction includes its responsibility for the orderly and efficient administration of justice within the circuit. In the exercise of this supervisory power a writ of mandamus should issue to confine a district court to its proper sphere of lawful power or to correct a clear abuse of discretion.

18/ American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F. 2d 277 (1967).

19/ 494 F. 2d 76 (1974).

20/ Miller v. United States, 403 F. 2d 77 (2d Cir. 1968).

This Court has repeatedly and clearly directed its district court's that Boys Markets relief cannot be granted unless (1) the labor dispute is found to be arbitrable,[21] (2) there is a court direction of the parties to arbitration[22] and (3) that the pre-conditions contained in Sections 7, 8 and 9 of the Norris-LaGuardia Act are satisfied.[23]

Chief Judge Mishler's temporary restraining order of November 19, 1975 was clearly in error and beyond the District Court's power. The order completely disregarded the Norris-LaGuardia Act's provision, the Boys Markets decision and the repeated direction of this Court regarding the "narrow" intent of the Supreme Court in that case. Furthermore, based upon this Court's past experience with the District Court for the Eastern District of New York there is sufficient reason to believe that that court will repeat this erroneous practice in the future.[24]

21/ Standard Food Products Corp. v. Brandenburg, 436 F. 2d 964 (2d Cir. 1970). This case came to the Second Circuit from a preliminary injunction granted by the District Court for the Eastern District of New York (1970).

22/ New York Telephone Co. v. C.W.A., 449 F. 2d 39 (2d Cir. 1971).

23/ Emery Air Freight Corp. v. Local 295, I.B.T., supra, note 6. This case came to this Court on appeal from various orders of the District Court for the Eastern District of New York.

24/ Chief Judge Mishler stated on the record that he issues a temporary restraining order anytime a Section 301 action is brought and there is an "arbitrable clause." (181a).

Section 7 of the Norris-LaGuardia Act governs the issuance of a temporary restraining order "in any case involving or growing out of a labor dispute..." Section 7 provides in relevant part that:

> "...[I]f a complainant shall...allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient if sustained, to justify a temporary injunction upon a hearing after notice. Such temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days."

Thus, Section 7 requires that a temporary restraining order may be issued only upon "testimony under oath," may last "no longer than five days," and its limited duration is emphasized by the peremptoriness of the command that it "shall become void at the expiration of said five days." This strong federal circumscription upon the issuance of a temporary restraining order in a labor dispute, both procedurally in its grant and time-wise in its duration, would be utterly subverted if a district court judge is permitted to initially grant a restraining order for a period beyond five days[25/] or extend the order for a period of unlimited

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25/ Judge Mishler's order to show cause with temporary restraining order was granted to Bohack on November 19, 1975 and the return date for the order to show cause was November 26, 1975.

duration.[26/] There is no discernible policy which would support a result so destructive of a command which Section 7 of the Norris-LaGuardia Act expresses. The provisions of 28 U.S.C. § 1651 provides a complete approach in this type of case. Only a writ can demonstrate this Court's disapproval of issuing temporary restraining orders in cases that do not come within the Boys Markets exception to the Norris-LaGuardia Act, as well as issuing Boys Markets injunctions without the Section 7, 8 and 9 preconditions of that Act being satisfied.

While reviewing the District Court's usurpation of power this Court should also review those ancillary questions contained in Chief Judge Mishler's Order of November 19, 1975. The questions of a debtor in possession's implicit assumption of a labor agreement and its obligations, if any, under Rule 919(b) of the Rules of Bankruptcy Procedure are "new and important" in light of this Court's recent decision in Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F. 2d 698 (1975) and BRAC v. REA, Docket Nos. 75-5007 and 75-5008 (Decided August 27, 1975).

26/ On November 26, 1975 Judge Mishler extended the provisions of the restraining order without date (187a-188a). Denial of Local 807's motion to dissolve that temporary restraining order does not extend the term of that restraint. Granny Goose Foods, Inc. v. Local 70, I.B.T., 415 U.S. 423 (1974).

We are faced with the fact that Bohack, the debtor in possession, is not the same entity as the pre-bankruptcy corporation. Yet, once it either assumes the old labor agreement or makes a new one, Bohack cannot thereafter "ignore its obligations under the Labor Act..."[27/] Chief Judge Mishler found that "Bohack was and is in contractual relation with [Local 807] under a labor agreement."[28/] Furthermore, Bohack, as a debtor in possession, admits that it is a "party"to the Agreement.[29/]

Chief Judge Mishler's Order remanded to Bankruptcy Judge Parente "[t]he advisability of granting [Bohack] leave to arbitrate"[30/] the disputes resulting from Bohack's changes in operation that caused the termination of all its truck drivers. These are disputes which Bohack admits to be arbitrable.[31/] Judge Mishler has concluded that before Local 807 and Bohack can proceed to arbitration on any grievance arising under the Agreement that Bankruptcy Judge Parente

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27/ Shopmen's Local Union No. 455, v. Kevin Steel Products, Inc., 519 F. 2d at 706.

28/ Page 118a of Appendix.

29/ Page 78a of Appendix.

30/ Page 129a of Appendix.

31/ Paragraph 12 (77a-78a), paragraph 17 (78a), paragraph 18 (79a) and paragraph 19 (79a).

"should first pass on the advisability of [his] retaining jurisdiction of [their] dispute." If he finds that the dispute "[affects] the proceedings before him" then he may (and apparently should) retain jurisdiction of it for a final determination.[32] Chief Judge Mishler relies upon Rule 919(b) of the Rules of Bankruptcy Procedure to support his judicial abrogation of the Agreement's grievance procedure.[33]

Rule 919(b) is an adaptation of § 26 of the Bankruptcy Act, 11 U.S.C. § 49, and the language of General Order 33 referring to arbitration. This rule permits persons, who are not parties to a contract containing an explicit grievance procedure, to stipulate to final and binding arbitration if the bankruptcy court authorizes the submission. This Court has, in Tobin v. Plein,[34] ruled on

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32/ Page 126a of Appendix.

33/ Rule 919(b) provides:

> "On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration."

34/ 301 F. 2d 378, at 381 (1962). See also: Schilling v. Canadian Foreign Steamship Company, Ltd., 190 F. Supp. 462, at 463 (1961).

Section 26 and General Order 33:

> "These provisions specify the procedure to be followed for the arbitration of controversies arising in the settlement of the estate. But this section is clearly drawn to provide arbitration machinery where no contractual arrangements exist. It does not supercede explicit contractual provisions."

Chief Judge Mishler's application of Rule 919(b) to the facts in this case is misplaced. That provision relates to controversies "affecting the estate." A contract does not support a "creditor's" claim against the estate unless it has been rejected.[35/] Once a labor contract has been assumed it supports a first priority claim "in advance of the payment of dividends to creditors."[36/] Both the Bankruptcy and District Courts have already granted Bohack's request for specific performance of the Agreement[37/] and Bohack admits that it is now and has been a party to the Agreement.[38/] Since Bohack assumed the Agreement, the Local 807-Bohack disputes do not "affect the estate." Any relief granted to Local 807 from submission of these disputes to the Agreement's grievance procedure constitutes a priority claim. Such a claim is beyond the scope of Rule 919(b).

35/ 11 U.S.C. 753; 11 U.S.C. 103(c)

36/ 11 U.S.C. 104.

37/ Paragraphs 1, 2 and 5 of Bankruptcy Judge Parente's Findings of Fact and paragraph 3 of his Conclusions of Law confirm that Bohack, the debtor, assumed the Agreement (50a-52a). Also, Chief Judge Mishler found that Bohack, the debtor, "was and is in contractual relation with [Local 807] under a labor agreement" (118a).

38/ Paragraph 16 in Bohack's counterclaim in Docket No. 75-C-1191 (78a).

The debtor in possession has the option to assume or reject an executory contract. Once Bohack exercised that option it became bound to all its terms and conditions and Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) governs its termination.[39/] Bohack has never raised a question during the July 30, 1974 - July 18, 1975 period (or during the proceedings before the Bankruptcy or District Courts) regarding its contractual obligations to its truck drivers or the jointly administered health and pension funds to which it makes contributions on behalf of those drivers. All of those obligations are contained in the Agreement.

In the interest of justice Local 807 respectfully requests that this Court exercise its discretion to entertain, at this time, a review of the District Court's application of Section 313(1) of the Bankruptcy Act, 11 U.S.C. 713(1), and Rule 919(b) to these facts. Bohack's terminated truck drivers and their families, so vitally affected by Bohack's conduct, are entitled to obtain an arbitrator's award of their employment, wage, health and pension claims under the Agreement. The health coverage for these truck drivers and their families terminated with their employment by

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39/ Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., supra.

Bohack. The economic climate being what it is in the metropolitan New York City area there has been little work opportunity for these truck drivers since their employment with Bohack was terminated. For many of these individuals they have never worked for another employer and are in the age bracket of mid-forties to early sixties.

Both the Bankruptcy and District Courts have previously reviewed these questions and rendered an opinion on both of them.[40/] It is impractical to believe that Bankruptcy Judge Parente is going to alter his opinion on either question in the revocation proceeding before him. Chief Judge Mishler mandated Judge Parente to commence that proceeding immediately despite (1) his own findings that Bohack "was and is in contractual relation with [Local 807]...", and (2) this Court's decision in Kevin Steel and REA.

The salient facts on assumption of the Agreement will be the same following the revocation proceeding. The appeals therefrom will only utilize additional judicial time unnecessarily. Furthermore, it will be in the best interest of the estate, and its creditors, for this Court to review these questions now. It will hasten Bohack's submission of its Plan of Arrangement and prevent those administration costs that would be incurred by piecemeal appeals of these questions.

40/ Supra, note 37.

POINT II

CHIEF JUDGE MISHLER'S TEMPORARY RESTRAINING ORDER VIOLATES THE NORRIS-LAGUARDIA ACT

There is no dispute between the parties about the fact that this case constitutes a "case involving or growing out of a labor dispute" as defined in the Norris-LaGuardia Act[41/] and that, except for the possible applicability of the Boys Markets exception the clear and unequivocal provisions of that Act would jurisdictionally bar the District Court from issuing the injunctive relief sought here. There is disagreement as to whether the facts here are such as to bring this case within the ambit of the Boys Markets exception, however, there can be no dispute of the continuing applicability to Boys Markets injunctions of the preconditions set forth in Sections 7, 8 and 9 of the Norris-LaGuardia Act, 29 U.S.C. § 107, 108 and 109.[42/] Before detailing the factual inapplicability of the Boys Markets exception, it is important to emphasize initially what the Supreme Court meant when it stated in Boys Markets:

> "Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act."

41/ 29 U.S.C. § 113(a).

42/ Emery Air Freight Corp. v. Local 295, supra, note 6. In this case none of those preconditions were satisfied in Chief Judge Mishler's temporary restraining order.

It is certainly true that Boys Markets overruled the holding in Sinclair Refining Company v. Atkinson, 370 U.S. 195 (1962).[43/] But the Supreme Court did not hold that Section 301 repealed Section 4 of the Norris-LaGuardia Act. Instead, the emphasis in Boys Markets was on accommodation of the two statutes. After carefully balancing the competing congressional policies underlying the two statutes, the Supreme Court stated:

> "We conclude, therefore, that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case." 398 U.S. at 253

43/ 29 U.S.C. 185.

Thus, the holding in Boys Markets was a "narrow one" because it applied only to the circumstances of that case where the issuance of an anti-strike injunction clearly promoted the policy announced in the Steelworkers Trilogy[44/] favoring the resolution of all labor disputes through arbitration and where, just as clearly, issuance of an anti-strike injunction did not contravene the "core purpose" of the Norris-LaGuardia Act.

Before comparing the circumstances of this case with that in Boys Markets, it is important to note that this Court has already had many occasions to consider the scope of the accommodation which is necessary between Boys Markets and the Norris-LaGuardia Act.[45/] In Emery this Court stated:

> "[I]t is helpful to pause to examine the current vitality of some of the provisions of the Norris-LaGuardia Act...Only a few months ago, in New York Telephone Co., supra, we had occasion to scrutinize the Act. We pointed out...that the 'generality' of injunctions issued in labor disputes had been one of the 'chief abuses that lead to the Norris-LaGuardia Act.' We

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44/ Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U. S. 574 (1960); Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960).

45/ Emery Air Freight Corp. v. Local 295, I.B.T., supra, note 6; New York Telephone Co. v. C.W.A., supra, note 22.

> emphasize that the Act still applies to all labor disputes in which a federal court can issue an injunction, that nothing in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), is to the contrary, and that although that decision allows an employer injunctive relief in a labor dispute, such relief is 'limited to vindicating the arbitration process ...'" 499 F. 2d at 588 (Emphasis in original).

This Court noted particularly the continuing applicability to Boys Markets injunctions of the preconditions set forth in Sections 7, 8 and 9 of the Norris-LaGuardia Act:

> Thus, before an employer in a dispute with a union can obtain an injunction there are a number of conditions to be satisfied. Section 7 of the Act... lists a good many of them, including the requirements that a temporary restraining order 'shall be effective for no longer than five days' and that such an order should not be issued except upon 'testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice,' and upon the condition that:
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> [C]omplainant shall first file an undertaking with adequate security... to be fixed by the court sufficient to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such... injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.
>
> Section 8 of the Act...requires a showing by the complainant that he had made 'every reasonable effort to settle' the dispute. Section 9...limits the restraints of a temporary restraining order to those specific acts...expressly complained of in the ...complaint."

Finally, the narrowness of the Boys Markets exception was emphasized by pointing out that the Supreme Court "held that a strike may be enjoined only in carefully defined circumstances." 449 F. 2d at 588. This Court has strictly limited the Boys Markets exception to the circumstances which gave rise to its birth -- "vindicating the arbitration process," 445 F. 2d at 50 -- and this Court has consistently refused to expand the exception to cover circumstances where the issuance of injunctive relief would encroach upon the policy judgments made by Congress in enacting the Norris-LaGuardia Act. See, Standard Food Products Corp. v. Brandenburg, 436 F. 2d 964 (2d Cir. 1970).

The legislative history of the Norris-LaGuardia Act more than confirms the propriety of the deference to the congressional judgments embodied in that Act which this Court has thus far so wisely shown. Indeed such judicial deference is absolutely mandatory if the courts are to avoid repeating the very judicial errors which made the enactment of the Norris-LaGuardia Act necessary -- the judicial emasculation of Section 20 of the Clayton Act, 29 U.S.C. §52.[46/]

While the language used in the Norris-LaGuardia Act is exceptionally broad, it was intended to be so, for as the Supreme

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46/ Rep. LaGuardia, Define and Limit the Jurisdiction of Courts Sitting in Equity, H.R. Rep. No. 669, 72nd Cong., 1st Sess. 3 (1932).

Court in Marine Cooks & Stewards v. Panama Steamship Co., 362 U.S. 365 (1960) recognized:

> "Congress was intent upon taking the federal courts out of the labor injunction business..." 362 U.S. at 369.

The wholesale return of the federal judiciary to the odious "labor injunction business" was not the Supreme Court's purpose in creating the Boys Markets exception. Indeed after delicately balancing the competing congressio al policies embodied in Section 4 of the Norris-LaGuardia Act and Section 301, the Supreme Court carefully delineated the circumstances in which the injunction may be issued by quoting the dissent in Sinclair as follows:

> "When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principals of equity...' 370 U.S. at 228. (Emphasis in original.)" 398 U.S. at 254.

Likewise, the Supreme Court carefully qualified its conclusion "that the Norris-LaGuardia Act does not bar the granting of injunctive relief" by adding the caveat "in the circumstances of the instant case," 398 U.S. at 253, which the opinion reiterates

is a "case of a strike over an arbitrable grievance." 398 U.S. at 254, 236-237, 249.[47/]

The situation here is quite different from that in Boys Markets and the facts heavily weigh the Boys Markets balance against issuing injunctive relief. Local 807 and Bohack brought the December 16, 1974 dispute to the Committee and received an award on May 16, 1975 wherein the Committee ordered Bohack to "cease and desist, forthwith, from having its bargaining unit work subcontracted out which is violative of said Article."[48/] Bohack refused to comply with that award and, on June 30, 1975, Local 807 exercised its contractual right to take economic action against Bohack's recalcitrance.[49/] The June 30, 1975 picketing involved a dispute which was expressly excepted from the no-strike provision of Article 46, Section 1 of the Agreement (32a).[50/]

47/ This requirement that the strike sought to be enjoined must be a strike over an arbitrable grievance was likewise reiterated throughout the dissenting opinion in Sinclair, 370 U.S. at 228, 218, 224-225, 227.

48/ Article 32, Section 1 of the Agreement (21a-22a).

49/ Article 46, Section 1(i) of the Agreement (34a) provides:

> "Failure of any Joint Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any stage, or failure to comply with any final decision, withdraws the benefits of Article 8 and 46" (12a-15a, 32a-34a).

Article 46, Section 1 (32a) provides:

> "The Union and Employer agree that there shall be no strike, lock-out, tie-up, work stoppage or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise."

50/ Standard Food Products v. Brandenburg, supra, note 21.

The balance struck in Boys Markets between the competing policies of Section 4 of the Norris-LaGuardia Act and Section 301 of the Labor-Management Relations Act is based upon the strike being over an arbitrable grievance. The importance of this requirement cannot be overemphasized. Only when a strike is over an arbitrable grievance does it also inherently subvert the arbitration process because the employer knows that, if he foregoes arbitration and immediately settles the underlying grievance, the economic detriment he suffers from the strike will end that much sooner. In Standard Food Products, this Court stated:

> "Where the collective agreement, as here, excepts from the requirement of arbitration certain types of contract violations and provided that the union retains the right to strike with respect to such violations, no injunction can issue against a strike where the union presents a colorable claim that such violations have occurred. The trial judge to whom under these circumstances an application for an injunction is made has no power to decide the merits of the controversy. The parties have agreed that such a controversy is to be left to the arbitrament of economic weapons. The court has no power to disregard their contract and force other methods upon them." 436 F. 2d at 967.

Assuming, arguendo, that there was an arbitrable dispute between Bohack and Local 807 on June 30, 1975, the situation here does not come within the "narrow" exception to the Norris-LaGuardia Act. In Boys Markets the Supreme Court held that before any injunction may issue the district court should order the employer to

arbitrate, as a condition of obtaining an injunction against the strike.[51/] Here, Bohack has sought an injunction to compel specific performance of Local 807's no strike clause. Yet, at the same time, it says it cannot now proceed with the Agreement's grievance procedure. Bohack contends that it must first seek authorization from the Bankruptcy Court under Rule 919(b). The Tenth Circuit, in Chief Freight Lines Co. v. Local 886, I.B.T., 514 F. 2d 572 (1975), found a similar position to be "untenable." To accept Bohack's argument would add another exception to the Norris-LaGuardia policy. In Chief the Court found that the employer "may not obtain an injunction against a strike and at the same time be relieved from the duty to arbitrate." The Tenth Circuit went on further to state:

> "In later proceedings, should circumstances develop whereby the Company is prepared to arbitrate, and to be subject to a requirement to do so, the District Court may reconsider whether any equitable relief sought is justified and proper..."

51/ See also Emery Air Freight Corp. v. Local 295, I.B.T., supra, note 6; New York Telephone Co. v. C.W.A., supra, note 22.

The general no-strike clause[52/] is Bohack's quid pro quo for undertaking the obligation to submit grievances involving "any controversy which might arise" between itself and Local 807 to the Agreement's grievance procedure. Bohack's undertaking to submit such disputes to this quick settlement procedure motivated Local 807 to agree not to strike. Bohack sought and obtained an injunction to compel specific performance of the Agreement's no-strike clause. Yet, at the same time, Bohack says that it cannot now proceed with the Agreement's grievance procedure. The Tenth Circuit's conclusion that such a position is "untenable" is correct and to conclude otherwise would serve as another exception to the Norris-LaGuardia Act.

52/ Article 46, Section 1 of the Agreement. (32a-34a).

POINT III

THE CONDUCT OF BOHACK, AS A DEBTOR IN POSSESSION, CONSTITUTES AN ASSUMPTION OF THE AGREEMENT

Bohack, the debtor in possession, is not the same entity as the pre-bankruptcy corporation. Yet, once it either assumes the old labor agreement or makes a new one, Bohack cannot thereafter "ig[illegible] obligations under the Labor Act..."[53/] Bohack, the debtor in possession, admits that it is a "party" to the Agreement.[54/] Chief Judge Mishler found that "Bohack was and is in contractual relation with [Local 807] under a labor agreement".[55/] Bohack sought and obtained from both the Bankruptcy Court and District Court specific performance of the "no-strike" provision in the Agreement.[56/] Bohack submitted to the Agreement's grievance procedure on December 20, 1974 and again on May 12, 1975. It, further, admits that the disputes between Local 807 and itself are subject to the Agreement's grievance procedure.[57/]

53/ Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., supra, note 27.

54/ Paragraph 16 of Bohack's counterclaim in Docket No. 75-C-1191 (78a).

55/ November 19, 1975 Order (118a,.

56/ [illegible]udge Parente's preliminary injunction (49a-53a) and Chief Judge Mishler's temporary restraining order (130a-131a).

57/ Supra, note 31.

Bohack has never raised any question during the July 30, 1974 - July 18, 1975 period (or during the proceedings before Bankruptcy Judge Parente or Chief Judge Mishler) regarding its contractual relations with Local 807 or its continued obligations under the Agreement. The terms and conditions of the Agreement which were initially agreed to by Local 807 and the pre-bankruptcy corporation continued to be applied by Bohack, the debtor in possession, until the termination of its truck drivers on July 18, 1975.

Bohack's stipulation to adjourn and stay the application to disaffirm the Agreement refers to a prospective date for rejection.[58] Also, Bohack's Bankruptcy and District Courts pleadings, the Findings of Fact and Conclusions of Law of Judge Parente and the Order of Judge Mishler all clearly reflect Bohack's adoption of the Agreement.

The debtor in possession has the option to assume or reject an executory contract. Once Bohack exercised that option it became bound to all its terms and conditions and Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) governs its termination.[59]

58/ Pages 105a-106a of Appendix.

59/ Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., supra; Public Ledger, Inc. 161 F. 2d 762, 765 and 767 (3rd Cir. 1947); Burke v. Murphy, 109 F. 2d 572 (2nd Cir. 1940).

POINT IV

RULE 919(b) OF THE RULES OF BANKRUPTCY PROCEDURE DOES NOT SUPERCEDE THE AGREEMENT'S GRIEVANCE PROCEDURE

Chief Judge Mishler remanded to Bankruptcy Judge Parente "[t]he advisability of granting [Bohack] leave to arbitrate" those disputes which resulted from Bohack's changes in operation and ultimately caused the termination of its truck drivers. Chief Judge Mishler determined that Judge Parente "should first pass on the advisability of [his] retaining jurisdiction of [these] disputes." Judge Parente is, apparently, to retain jurisdiction if he finds that they "[affect] the proceedings before him." If so, a judicial settlement of these disputes would be substituted for the grievance settlement machinery contained in the Agreement. This would be inconsistent with our national labor policy's preference for the settlement of labor disputes through the labor Agreement's grievance procedure.

There are several reasons for the Supreme Court's strong preference for labor dispute settlements coming via the route of the contractual grievance procedure rather than from the judiciary. This preference was strongly emphasized in United Steelworkers v. Warrior and Gulf Navigation Co.[60] and the two other cases of the Steelworkers Trilogy.[61] First, the Court stated that the selected

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60/ 363 U.S. 574 (1960).

61/ United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

grievance forum is more competent than a court to interpret the collective bargaining agreement and to resolve technical problems of labor-management relations. Second, the Court stressed that a grievance procedure contributes to the maintenance of labor peace. Third, the Court pointed out that ordering the parties to submit agreed upon disputes to the grievance procedure was essential to effect the parties contractual intent to settle disputes through that process.

Chief Judge Mishler's remand to the Bankruptcy Court of the issue whether Bohack should be compelled to submit its disputes with Local 807 to the Committee goes beyond the District Court's role in a Section 301 action.[62/]

This Court held in the Sterling Optical case that:

> "The scope of the court's inquiry is accordingly limited: 'It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.'"

Reliance upon Rule 919(b) to support a remand of this issue to the Bankruptcy Court is clearly contrary to the purpose for that Rule and this Court's decisions respecting its application. That

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62/ United Optical Workers Union Local 408 v. Sterling Optical Company, Inc., 500 F. 2d 220 (2d Cir. 1974); Bressette v. International Talc Co., F. 2d (2nd Cir. 1976), 91 LRRM 2077.

rule is an adaptation of § 26 of the Bankruptcy Act and the language in General Order 33 referring to arbitration. The procedure set forth in Rule 919(b) is to be followed where no contractual arbitration machinery exists. "It does not supercede explicit contractual provisions.[63/]

63/ Tobin v. Plein, 301 F. 2d 378 (2d Cir. 1962); Schilling v. Canadian Foreign Steamship Company, Ltd., 190 F. Supp. 462 (S.D.N.Y. 1961).

POINT V

WHY THE MAY 16, 1975 GRIEVANCE AWARD OF THE COMMITTEE SHOULD BE CONFIRMED

Chief Judge Mishler refused to confirm the May 16, 1975 grievance award of the Committee because he erroneously concluded "that the grievance as presented to the [Committee] was a matter outside its jurisdiction and the proceedings upon which it was based a nullity."[64/] Before detailing the basis for adjudging that the District Court should not have engaged in such a procedural interpretation of the Agreement, and left that to the forum so designated in the Agreement, it is worth-while to outline the jurisdiction of each of the grievance tribunals referred to in the Agreement and the applicable grievance procedure in this case.[65/]

The Agreement consists of three (3) sections. First, Articles 1-39 (5a-24a) constitutes the National Master Freight Agreement ("National Section"). Second, Article 40-68 (28a-42a) contain the New Jersey-New York Area General Trucking Supplemental Agreement ("Area Section").

64/ Judge Mishler also concluded that Bohack required prior authorization from Bankruptcy Judge Parente before submitting this dispute to the Agreement's grievance procedure. The application of Rule 919(b) of the Rules of Bankruptcy Procedure to the circumstances of this case has been covered and will not be repeated in Point V.

65/ There is no dispute between the parties hereto that the dispute is substantively applicable to the Agreement's grievance procedure.

Third, there is a two page document known as the Local 807 Rider Agreement ("Rider") 66/ (63a-64a).

The negotiators of the National Section were the Teamsters National Freight Industry Negotiating Committee ("Negotiating Committee") and Truck Employers, Inc. ("TEI"). The National Committee consists of the General Executive Board for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("International") and staff employees of the International. TEI represents the various trucking associations throughout the country that maintain a collective bargaining relationship with affiliated locals of the International. The Area Section is negotiated on a multi-employer, multi-union basis within the State of New Jersey and the metropolitan New York City area within the State of New York. The negotiators for the Area Section include the Negotiating Committee and TEI, as well as the New Jersey-New York Union Negotiating Committee and the New Jersey-New York Employer Negotiating Committee. The Rider was negotiated by Local 807 and representatives of the various employers maintaining a collective bargaining relationship with Local 807.

66/ Article 1, Section 3 of the Agreement provides (5a):

> "This Agreement and Supplemental Agreements hereto, hereafter referred to collectively as 'Agreement'..."

The Agreement's grievance procedure is contained in Articles 8 (12a-15a) and 46 (32a-34a). The jurisdiction for each of the grievance forums referred to in the Agreement are set forth in Articles 8, 45 and 46.[67/]

The Agreement, except in matters of discharge, does not assure the parties of final and binding arbitration of grievances. Only the treatment of matters of discharge by the New York City Trucking Arbitration Authority is referred to as "arbitration."[68/] Disposition of other grievances by a majority vote of the Committee is referred to in the terminology of "settlement."[69/] If a dispute or grievance is settled by a majority vote of the Committee its decision is final and binding on the union, employer and any

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67/ The jurisdiction of the National Grievance Committee is set forth in Article 8, Sections 1(a),(b),2(b), 3 and 4 (12a-14a); the Committee's is found in Article 45, Section 1 and Article 46, Section 2 (31a-34a); the Joint Area Committee's is located in Article 45, Section 2 and Article 46, Section 1(c) (31a,33a); the Eastern Conference Joint Area Committee's is stated in Article 45, Section 3 and Article 46, Section 1(f) (31a,33a-34a) and the New York City Trucking Arbitration Authority is set forth in Article 46, Section 1(a) (33a).

68/ The New York City Trucking Arbitration Authority has exclusive jurisdiction of all discharge cases involving Local 807 and signatory employers to the Agreement (Article 46, Section 1(a)) (33a).

69/ Article 45, Section 1 (31a) of the Agreement gives the Committee exclusive jurisdiction over all disputes and grievances involving the parties hereto, except for discharge cases.

employee(s) involved.[70] However, where a decision of the Committee interprets a provision contained in the Area Section it is automatically reviewed by the Joint Area Committee.[71] The Joint Area Committee may review Committee decisions on its own initiative "to assure clear and uniform understanding of the meaning of all provisions" of the Area Section.[72]

70/ Article 46, Section 1(b)(1) of the Agreement (33a) provides:

> "Where a [Committee], by majority vote, settles a dispute, no appeal may be taken to the Joint Area Committee. Such decision shall be final and binding on the Local Union, the Employer and any employee(s) involved."

71/ Article 46, Section 2(g) of the Agreement (34a) provides:

> "It is further agreed that all matters pertaining to the interpretation of this Agreement, as defined in Article 45 of this Agreement, shall automatically be reviewed by the Joint Area Committee and any decision of the [Committee] may be reviewed by the Joint Area Committee on its own initiative at any time if any member thereof has reason to believe such decision could be or is being construed as [an] interpretation of [the] contract as defined in this Agreement."

72/ Ibid.

If the Committee deadlocks and cannot settle a grievance or dispute by a majority vote the matter is referred to the Joint Area Committee.[73] By mutual agreement of the parties to the dispute or grievance, which could not be settled by the Committee, it may be referred directly to the Eastern Conference Joint Area Committee and, thereby, bypass the Joint Area Committee.[74] If the Joint Area Committee hears the case and, by a majority vote, settles the dispute, no appeal may be taken to the Eastern Conference Joint Area Committee.[75] The decision is final and binding. If the

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73/ Article 45, Section 2 of the Agreement (31a) provides:

> "The Joint Area Committee, in accordance with the procedures established in Article 46 of this Agreement, shall have jurisdiction over disputes and grievances involving the Employer and Local Unions which cannot be settled by majority vote of the [Committee]."

74/ Article 46, Section 1(c) of the Agreement (33a) provides:

> "Where a Joint Local Committee is unable to agree or come to a decision on a case, the dispute shall be promptly submitted to the Joint Area Committee. By mutual agreement the parties may waive the Joint Area Committee step and submit any case deadlocked by the [Committee] to the Eastern Conference Joint Area Committee. Such cases as are referred shall include the minutes of the [Committee's] proceedings on the case. Such minutes shall set forth the positions and facts relied on by each party, but each party may appear and present evidence at the hearing before the Joint Area Committee or the Eastern Conference Joint Area Committee."

75/ Article 46, Section 1(d) of the Agreement (33a) provides:

> "Where the Joint Area Committee, by a majority vote, settles a dispute, no appeal may be taken to the Eastern Conference Joint Area Committee. Such decision shall be final and binding on both parties with no further appeal."

Joint Area Committee deadlocks, at the request of either of the parties involved in the dispute, it will be referred to the Eastern Conference Joint Area Committee.[76] Where the Eastern Conference Joint Area Committee settles a dispute, by a majority vote, it is final and binding.[77] If the case is deadlocked it may, if agreed upon by a majority of that panel, submit the dispute to an umpire for a decision.[78] If the Eastern Conference Joint Area Committee does not submit the deadlocked dispute to an umpire the case is to be referred to the National Grievance

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76/ Article 46, Section 1(f) of the Agreement (33a-34a) provides:

> "Where the Joint Area Committee is unable to agree or come to a decision on a case, it shall at the request of the Union or the Employer involved, be appealed to the Eastern Conference Joint Area Committee..."

77/ Ibid (34a).

78/ Article 46, Section 1(h) of the Agreement (34a) provides:

> "Deadlocked cases may be submitted to umpire handling if a majority of the Eastern Conference Joint Area Committee determines to submit such matter to an umpire for decision."

Committee.[79] In the event that the case is deadlocked by the National Grievance Committee the no-strike clause of the Agreement ceases to be effective and either party may resort to "all legal and economic recourse."[80]

The only occasion for the National Grievance Committee to make an original record on any matter brought before it is as a condition precedent to a damage action contemplated as a result of a lockout, unauthorized strike etc. during the term of this Agreement.[81] For the National Grievance Committee to review a factual grievance it must go up the appellate ladder. The original record is developed by the Committee and the Committee, Joint Area Committee and Eastern Conference Joint Area Committee must, each, be unable to reach a majority decision. Even so, the only way that

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79/ Article 8, Section 1(a) of the Agreement (12a) provides:

> "If upon the completion of the grievance procedure of the Supplemental Agreement the matter is deadlocked the case shall be immediately forwarded to both the Employer and Union Secretaries of the National Grievance Committee, together with all pertinent files, evidence, records and committee transcripts."

80/ Article 8, Section 1(b) of the Agreement (12a) provides:

> "If the National Grievance Committee is deadlocked on the disposition of the dispute then either party shall be entitled to all lawful economic recourse to support its position in the matter."

81/ Article 8, Section 2(b) of the Agreement (13a-14a)

this type of case gets to the National Grievance Committee is if a majority of the Eastern Conference Joint Area Committee do not agree to submit the dispute to an umpire for decision(34a).

The Agreement also empowers the National Grievance Committee with both direct and certiorari jurisdiction over the interpretation of provisions contained in the National Section.[82/] A request for a

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82/ Article 8, Section 1(a) and Section 3 of the Agreement (12a,14a). Article 8, Section 1(a) provides:

> "Any request for interpretation of the National Master Agreement shall be submitted directly to the Conference Joint Area Committee for the making of a record on the matter, after which it shall be immediately referred to the National Grievance Committee. Such request shall be filed with both the Union and Employer Secretaries of the National Grievance Committee with a complete statement of the matter."

Article 8, Section 3 provides:

> "The National Grievance Committee by majority vote may consider and review all questions of interpretation which may arise under the provisions contained in the Master Agreement which are submitted by either the Union Area Director or the designated Employer representative; and shall have the authority to reverse and set aside the majority interpretation of any area, regional, or local grievance committee, if, in its opinion, such interpretation is contrary to the provisions set forth in the Master Agreement, in which case the decision of the National Grievance Committee shall be final and binding."

direct interpretation by the National Committee of any provision contained in the National Section is submitted directly to the Joint Area Committee. That panel makes the record of the issues, and positions involved and submits the record to the National Grievance Committee for decision.[83] The National Grievance Committee may also review interpretations of the National Section made by any area, regional or local grievance committee and has the authority to reverse that interpretation.[84] The decision of the National Grievance Committee is final and binding.[85]

Although the National Grievance Committee has sole jurisdiction to make final interpretations of the National Section an interpretation of the National Section can be made by the Committee, Joint Area Committee or Eastern Conference Joint Area Committee. However, any interpretation of the National Section by one of these other tribunals is subject to review and reversal by the National Grievance Committee. On a direct request the record is made by the Joint Area Committee. Where the National Grievance Committee reviews interpretations on the National Section the record is made at the level where the grievance or dispute is "settled" and either the Union Area Director or the designated Employer representatives

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83/ Supra, note 82.

84/ Supra, note 82.

85/ Ibid.

can submit a request for review to the National Grievance Committee.

In the case at bar Bohack never sought a direct interpretation of any provision of the National Section nor did it seek review of any interpretation that may be included in the Committee's May 16, 1975 decision. Thus, the grievance procedure for interpretations of the National Section has no application to this dispute or the May 16, 1975 grievance decision. The only other basis for the National Grievance Committee to become involved in a dispute or grievance is on appeal from a series of deadlocked decisions from the Committee through the Eastern Conference Joint Area Committee levels. This is not applicable to this dispute since the Committee rendered a final and binding decision on the matter.

The jurisdictional conclusion reached by Chief Judge Mishler, which was based upon his interpretation of the Agreement, was also incorrect because the Committee possessed exclusive, original, jurisdiction on all questions or disputes concerning the interpretation, application or enforcement of the grievance procedure set forth in the Agreement.[86/] Bohack never appealed the Committee's

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86/ Article 46, Section 2 of the Agreement (34a) provides:

> "Questions or disputes concerning the interpretation, application or enforcement of the grievance procedures provided in this Agreement shall themselves be deemed arbitrable before the [Committee] subject to the appeals procedures set forth in this Article."

decision or its interpretation, application or enforcement of the grievance procedure, as required by Article 46, Section 3 of the Agreement.[87/]

Article 7 of the Agreement (12a) makes it perfectly clear that Local 807 can file any grievance or dispute under the local grievance procedure.[88/] The final step of that procedure is submission of the dispute or grievance to the Committee for settlement. The only exceptions to that rule are (1) discharge cases[89/] and (2) disputes wherein either or both parties seek a declaratory interpretation of the National Section by submitting a request directly to the Joint Area Committee.[90/] A majority decision of the Committee is final and binding unless reviewed and reversed

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87/ Article 46, Section 3 of the Agreement (34a) provides:

> "All appeals permitted to be taken in accordance with the procedures set forth in this Article must be taken within fourteen (14) days from the date of receipt of the decision or award."

88/ Article 7 of the Agreement (12a) provides:

> "Authorized representatives of the Union may file grievances alleging violation of the Agreement, under local grievance procedure, or as provided herein."

89/ Supra, note 68.

90/ Supra, note 82.

by an appellate tribunal on (1) a question of interpretation of the Agreement[91] or (2) application and/or enforcement of the grievance procedure.[92] With respect to the facts and issues in this dispute the Committee is the only grievance tribunal of original jurisdiction capable of rendering a decision. The other forum referred to in the Agreement are limited to specific appellate review.

The next question is whether the District Court should have engaged in any procedural interpretation of the Agreement or left it to the forums so designated therein. The Second Circuit and the Supreme Court have spoken clearly on this issue. The function of the Court in the administration of the grievance process is to determine whether the dispute or grievance is subject to that process, John Wiley & Sons v. Livingston.[93] The judicial determination is limited to whether the dispute is subject to the grievance procedure, but all other questions - procedural, jurisdictional or substantive - are solely within the power of the arbitrator to determine. Cox, "Reflectio , Upon Labor Arbitration," 72 Harvard L. Rev. at 1511.

91/ Supra, note 76, Article 45, Section 3 (31a-32a) or Article 8, Sections 3 & 4 (14a).

92/ Supra, note 86.

93/ 376 U.S. 543 (1964), reviewing a judgment of the Second Circuit directing arbitration (313 F. 2d 52). Also, Bressette v. International Talc Co., supra, note 62.

Since the grievance procedure is a matter of contract a party cannot be required to submit a dispute to the grievance procedure which the parties have not agreed to submit.[94] A balance has been achieved between that policy and the strong declaration of the Supreme Court favoring settlement of the difference between parties to a collective bargaining agreement by the grievance procedure.

Achievement of that balance was attained by limiting the function of the court:

> "[T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[95]

Another function of the court surfaces when enforcement

94/ United Steelworkers v. Warrior and Gulf Navigation Co., supra, note 60. That is not at issue in this case. Both Bohack and Local 807 agree that the dispute is substantively subject to the Agreement's grievance procedure.

95/ United Steelworkers v. Warrior & Gulf Navigation Co., supra, note 60 at pp. 582-83; Bressette v. International Talc Co., supra, note 62; Corset & Brassiere Workers Union v. Melody Brassiere & Girdle Company, Inc., F. Supp. (Docket No. 75 Civ. 5348 (SDNY, 1976).

of a grievance decision or arbitration award is sought.[96/] The Supreme Court has addressed itself to this specific point in United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960): "It is the arbitrator's construction which was bargained for and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

The basic philosophy underlying the court's "hands-off" policy is very simple-labor matters are best left to those who understand the industry and its common law. Even the most able judge cannot bring the same competence (as an arbitrator) to bear upon the determination of a grievance, because he is not similarly informed.

Thus, judicial review of an arbitrator's award is severely limited and the arbitrator's interpretation of contractual provisions should not be disturbed "if the interpretation can in any rational way be derived from the agreement viewed in the light

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96/ The fact that the grievance procedure in the Agreement is not referred to as "arbitration" is not significant. The Supreme Court stated in General Drivers v. Riss & Co., 372 U.S. 517 (1963), "Thus, if the award at bar is the parties chosen instrument for the definitive settlement of grievances under the Agreement it is enforceable under § 301, and if the Joint Area Cartage Committee's award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance."

of its language, its context, and any other indicia of the parties intention; only where there is manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award." Honold Mfg. Co. v. Fletcher, 405 F. 2d 1123 (3rd Cir. 1969).

The May 16, 1975 grievance award of the Committee has certainly met these judicial standards and should be confirmed.

CONCLUSION

1. For the foregoing reasons Plaintiff-Appellant and Petitioner request that a writ of mandamus be issued by this Court (1) directing the dissolution of Chief Judge Mishler's temporary restraining order; (2) staying Chief Judge Mishler's remand to the Bankruptcy Court of the issue whether Bohack should be required to submit itself to the grievance procedure contained in the Agreement and (3) compelling immediate submission of the disputes between Bohack and Local 807 to the Agreement's grievance procedure.

2. The Plaintiff-Appellant and Petitioner request that this District Court's judgment, entered in favor of Bohack and against Local 807, denying confirmation of the May 16, 1975 award be reversed and that judgment be entered in favor of Local 807 confirming that award.

Dated: Queens, New York
February 13, 1976

Respectfully submitted

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& Petitioner
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STATE OF NEW YORK)
COUNTY OF QUEENS) ss.:

Joseph Votta, being duly sworn deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 32-43 49th Street, Long Island City, New York. On February 13, 1976 deponent served Truck Drivers Local Union No. 807, International Brotherhood of Teamster's brief in this consolidated appeal together with the joint appendix on The Bohack Corporation by Kelley, Drye & Warren, Esqs., at 350 Park Avenue, New York, New York 10022.

JOSEPH VOTTA

Sworn to before me this
13 day of February, 1976.

J. WARREN MANGAN
NOTARY PUBLIC, State of New York
No. 31-2504951
Qualified in Westchester County
Certificate Filed in Queens County
Term Expires March 30, 1977